

## **321 CMR 10:00 MASSACHUSETTS ENDANGERED SPECIES ACT**

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## **PART I: GENERAL PROVISIONS: DEFINITIONS, LISTING, TAKING PERMITS, RESPONSIBILITIES OF STATE AGENCIES**

### **10.01: Introduction and Purpose**

(1) Introduction. 321 CMR 10.00 is promulgated by the Massachusetts Division of Fisheries and Wildlife pursuant to the authority granted under M.G.L. c. 131A, the Massachusetts Endangered Species Act ("MESA"). 321 CMR 10.00 shall complement MESA and shall have the force of law upon their effective date.

(2) Purpose. ~~MESA sets forth procedures for the listing of Endangered, Threatened, and Special Concern species native to Massachusetts, the designation of Significant Habitats for such species, and establishes rules and prohibitions regarding the activities which take such species or alter their Significant Habitats. The purpose of 321 CMR 10.00 is to define and clarify the procedures and rules established under MESA.~~ **The purpose of 321 CMR 10.00 is to define and clarify the procedures and rules necessary for the agency to carry out responsibilities under Chapter 131A, Massachusetts Endangered Species Act. These regulations establish a comprehensive approach to the protection of the Commonwealth's Endangered, Threatened, and Special Concern species and their habitats. Regulations include provisions for the protection of habitat areas (Significant Habitat) where in the Division's opinion any Project or Activity would result in the Take of any Threatened or Endangered species. Also included are environmental review provisions for habitat areas (Priority Habitat) identified as areas where there is the potential that a Take of any Endangered, Threatened, or Special Concern species may occur as a result of any Project or Activity. Separate review mechanisms are established for Projects and Activities in these areas. Priority Habitats are used for screening Projects and Activities that may result in the Take of State-listed Species and to provide guidance to project proponents regarding a Project or Activity through consultation with the Division. The Priority Habitat review procedures are designed to assist Project or Activities that will take place in mapped Priority habitat in order to avoid a Take of a state-listed species. Specifically, CMR 10.00 sets forth procedures for the listing of Endangered, Threatened, and Special Concern species, establishes rules and prohibitions regarding activities which Take such species or alter designated Significant Habitats, the Taking and possession of State-listed Species, and procedure for the delineation of Priority Habitat, and the review of Projects and Activities within Priority Habitat.**

### **10.02: Definitions and Abbreviations**

For the purposes of 321 CMR 10.00, the following words or phrases shall have the following meanings:

Activity ~~means any act carried out by a person which could affect the habitat of an Endangered or Threatened species.~~

Agriculture

(a) Land in agricultural use means land primarily and directly used in raising animals including, but not limited to, dairy cattle, beef cattle, poultry, sheep, swine, horses, ponies, mules, goats, bees and fur-bearing animals, for the purposes of selling such animals or a product derived from such animals in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such animals and preparing them or the products derived therefrom for market; or when primarily and directly used in raising fruits, vegetables, berries, nuts and other foods for human consumption, feed for animals, tobacco, flowers, sod, trees, nursery or greenhouse products and ornamental plants and shrubs for the purpose of selling such products in the regular course of business; or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products and preparing them for market.

(b) Normal maintenance or improvement of land in agricultural use means:

1. all tilling and harvesting practices customarily employed to enhance existing growing conditions;
2. the pasturing of animals including the construction and maintenance of such fences as may be required;
3. the use of fertilizers, pesticides, herbicides, and other materials, subject to all state and federal laws and regulations governing their use;
4. the constructing, grading or restoring of field ditches, subsurface drains, grass waterways, vents, access roads, farm ponds and similar projects to improve drainage, prevent erosion, provide more effective use of rainfall and improve equipment operation and efficiency, all in order to improve conditions for the growing of existing crops or raising of animals;
5. the cultivation of cranberries, including the following practices: sanding operations using existing pits; cleaning of cross ditches, canals and natural waterways; repair and replacement but not enlargement of water control structures, including flumes, pumps, dikes and piping above and below ground; repair, replacement and regrading of existing cranberry bogs; and repair and cleaning of reservoirs, dams and water storage systems within the limits of existing water rights;—;

6. provided that activities resulting in a taking of any State-listed Species are not to be considered normal maintenance and improvement of land in agricultural use.

Alter means to change the physical or biological condition of a **designated Significant Habitat** in any way that detrimentally affects the capacity of the **Significant Habitat** to support a population of Endangered or Threatened species and shall include without limitation those activities listed in 321 CMR 10.33 **63(1)**. (~~See the definition of "Capacity of a habitat to support a population of Endangered or Threatened species."~~)

Animal means any member of the animal kingdom including, but not limited to, any mammal, bird, reptile, amphibian, fish, mollusk, crustacean, arthropod or other invertebrate or any part, product, egg or offspring or the dead body or any part thereof.

Aquaculture.

(a) Land in aquacultural use means land and waters used primarily and directly in the commercial cultivation of aquatic organisms, including finfish, mollusks or crustaceans, in a controlled environment.

(b) Normal maintenance and improvement of land in aquacultural use means the following activities, when done in connection with the production of aquatic organisms as defined above: draining, flooding, heating, cooling, removing, filling, grading, compacting, raking, tilling, fertilizing, seeding, harvesting, filtering, rafting, culverting or applying chemicals in conformance with all state and federal laws; provided, however, that such activities are clearly intended to improve and maintain land in existing aquacultural use and the best management practices are utilized to ensure that there will be no adverse effect on any designated Significant Habitat outside the area in active aquacultural use, and further provided that activities resulting in a taking of any state listed species is not to be considered normal maintenance and improvement of land in aquacultural use.

Best Scientific Evidence Available means species occurrence records, population estimates, habitat descriptions, ~~and~~ assessments, **scientific literature** and information contained in the records of the Natural Heritage and Endangered Species Program or other credible scientific reports or species sighting information reasonably available to the Director. ~~before the expiration of the public comment period.~~

Capacity of a **Designated Significant Habitat** to support a population of Endangered or Threatened Species means those biological or physical features in an area which could be utilized by an Endangered or Threatened plant or animal or play a role in the survival of an Endangered or Threatened species. Components of the capacity of a **Designated Significant Habitat** to support a population of Endangered or Threatened species include, but are not limited to, space, food, shelter, nesting and foraging sites, overwintering sites, host plants, soils, vegetation, hydrologic regime, substrate, degree of exposure to sun or shade, water temperature, and water quality.

Director means the Director of the Division of Fisheries and Wildlife within the Department of Fish and Game.

Division means the Division of Fisheries and Wildlife within the Department of Fish and Game.

Endangered species means any species of plant or animal listed as an Endangered species pursuant to 321 CMR 10.03 and so listed at 321 CMR 10.60.

Extinction means the loss of a species from its entire global range.

Extirpation means the loss of a species from its entire range within Massachusetts.

Federal Endangered Species Act means The Endangered Species Act of 1973, as amended, 16 U.S.C. § 1531 et seq., and the regulations promulgated thereunder.

Federal list means the List of Endangered and Threatened Wildlife (50 CFR 17.11) and the List of Endangered and Threatened Plants (50 CFR 17.12).

Federally listed species means any species on the federal list.

Fisheries & Wildlife Board means the board established pursuant to M.G.L. c. 131 § 1A.

Forestry.

(a) Land in forestry use means forest land that is primarily and directly used in raising forest products and for which the state forester, in consultation with NHESP, has certified a forest management plan.

(b) Normal maintenance or improvement of land in forestry use means all activities conducted in accordance with a forest management plan.

(c) Forest management plan means a planned program to improve the quantity and quality of a continuous crop of trees for the purpose of selling such products in the regular course of business or when primarily and directly used in a related manner which is incidental thereto and represents a customary and necessary use in raising such products and preparing them for market, and may include plans prepared under M.G.L. c. 61 or other comparable multi-year management plans, but not including Forest Cutting Plans prepared under M.G.L. c. 132.

Habitat means an area which, due to its physical or biological features, provides important elements for the growth and survival of plants or animals such as food, shelter, or living space, and includes without limitation, breeding, feeding, resting, migratory, or overwintering areas. Physical or biological features include, but are not limited to: structure and composition of the vegetation; faunal community; soils; water chemistry and quality; and geologic, hydrologic, and microclimatic factors.

Native, in reference to species, means a species which either occurs, or has occurred, within Massachusetts; provided that the original occurrence of such species is not the result of a deliberate or accidental introduction by humans into Massachusetts nor an introduction elsewhere which spread into Massachusetts.

Natural Heritage and Endangered Species Program means the program within the Division of Fisheries and Wildlife responsible for the inventory, research, and protection of rare plant and animal species and the maintenance of computerized and manual records of rare species locality information.

Natural Heritage and Endangered Species Advisory Committee means the committee established pursuant to M.G.L. c. 131, § 5B.

Net Benefit means an action, or set of actions, that contributes, on its own or in the context of other actions, significantly to the long-term conservation of a State-listed Species and that the conservation contribution to the impacted State-listed Species exceeds the harm caused by a proposed Project or Activity.

Person means an individual, corporation, partnership, trust, association or other private entity or any officer, agent, department or instrumentality of the federal government or any state or its political subdivisions, including but not limited to any agency, department, board, commission or authority thereof.

Plant means any member of the plant kingdom including seeds, roots, or other parts.

Priority Habitat means the approximate geographic extent of Habitat for State-listed Species as delineated by the Division pursuant to 321 CMR 10.12. The delineation of Priority Habitat by the Division is based on records of listed species with the last 25 years of the delineation and contained in the Division's NHESP database.

Project or Activity means, for the purposes of 321 CMR 10.11 through 10.24, any action, including, but not limited to:

- (a) grading, excavating, filling, demolition, draining, dumping, dredging, or discharging;
- (b) the erection, reconstruction, or expansion of any buildings or structures;
- (c) the construction, reconstruction, improvement or expansion of roads and other ways;
- (d) the installation of drainage, sewage and water systems, or;
- (e) beach nourishment or dune building;
- (f) the construction or reconstruction of seawalls, groins, dikes, jetties or retaining walls;
- (g) the destruction of plant life.

Record Owner means any person or entity holding a legal or equitable interest, right or title to real property, as reflected in a written instrument or recorded deed, or any person authorized in writing by any such person.

~~Record owners of land or interests in land means those persons holding an ownership or other interest and whose identity is revealed in the chain of title.~~

Significant Habitat means any specific area of Massachusetts designated pursuant to 321 CMR 10.15 through 10.18.

Species means any distinct plant or animal population whose members interbreed or cross pollinate when mature or are self-perpetuating through the production of viable seed or offspring and can include any subspecies or variety of plant or animal.

Species of Special Concern and Special Concern Species mean any species of plant or animal listed as a Species of Special Concern pursuant to 321 CMR 10.03 and so listed at 321 CMR 10.60.

State Agencies means all agencies, departments, boards, commissions, and authorities of the Commonwealth, including any authority of any political subdivision which is specifically created as an authority under special or general law.

State-list means the Massachusetts list of Endangered, Threatened, and Special Concern species found at 321 CMR 10.60.

State-listed Species means any species on the State List.

Take, in reference to animals, means to harass, harm, pursue, hunt, shoot, hound, kill, trap, capture, collect, process, disrupt the nesting, breeding, feeding or migratory activity or attempt to engage in any such conduct, or to assist such conduct, and in reference to plants, means to collect, pick, kill, transplant, cut or process or attempt to engage or to assist in any such conduct. **Disruption of nesting, breeding, feeding or migratory activity may result from, but is not limited to, the modification, degradation or destruction of Habitat.**

Threatened species means any species of plant or animal listed as a Threatened species pursuant to 321 CMR 10.03 and so listed at 321 CMR 10.60.

Viability of a Significant Habitat to support a population of Endangered or Threatened species means the ability of a Significant Habitat to sustain one or more populations of Endangered or Threatened species in the short and long term and may be expressed as the likelihood that the local population(s) of a given size will persist in a Significant Habitat.

Abbreviations: The following abbreviations for agency names, programs, and other terms are used in 321 CMR 10.00.

**DEP—Department of Environmental Protection**

**EIR—** Environmental Impact Report, as defined under 301 CMR 11.07

**ENF—** Environmental Notification Form, as defined under 301 CMR 11.28

**EOEA—** Executive Office of Environmental Affairs

**MEPA—** Massachusetts Environmental Policy Act, M.G.L. c. 30, § 61 through 62H and its implementing regulations, 301 CMR 11.00.

**MESA—** Massachusetts Endangered Species Act, M.G.L. c. 131A

**NHESP—** Natural Heritage and Endangered Species Program

**RTA—** Request to Alter Significant Habitat Form



VMP— Vegetation Management Plan, as defined under 333 CMR 11.00

YOP— Yearly Operating Plan, as defined under 333 CMR 11.00

### 10.03 Listing of Species

(1) Introduction. The list of Endangered, Threatened, and Special Concern species in effect prior to the effective date of 321 CMR 10.00, as amended by the Fisheries and Wildlife Board on December 30, 1991, is established within 321 CMR 10.60 ~~90~~ as the first edition of the list. This section establishes the procedures for amending and updating all subsequent editions of the list.

(2) Species Investigations. The NHESP shall conduct investigations, including but not limited to field surveys and reviews of museum collections, herbaria and published reports, in order to determine whether any species of plant or animal should be considered for listing.

(3) Eligible species. Any species native to Massachusetts is eligible for listing.

(4) Federally Listed Species. Any species which regularly occurs within Massachusetts and which is listed as endangered or threatened under the provisions of the Federal Endangered Species Act shall be listed in an equivalent category on the state list found at 321 CMR 10.60 ~~90~~; provided, however, that the listing of any species on the federal list as a Threatened species shall not limit the discretion of the Director to list said species as Endangered.

(5) Criteria for Listing Species. The criteria for determining Endangered, Threatened, or Special Concern status shall be based on biological data, including, but not limited to

- (a) taxonomic status;
- (b) reproductive and population status and trends;
- (c) whether the species is native or has been introduced;
- (d) vulnerability, as determined by threats to the species or its habitat;
- (e) specialization, as determined by unique habitat requirements;
- (f) restricted distribution, as determined by limited or disjunct geographic range; and
- (g) rarity, as determined by a limited number of occurrences or by occurrence in limited numbers.

(6) List Categories.

(a) Endangered. The Director shall list as Endangered any species of plant or animal in danger of extinction throughout all or a significant portion of its range and species of plants or animals in danger of extirpation as documented by biological research and inventory.

(b) Threatened. The Director shall list as Threatened any species of plant or animal likely to become an Endangered species within the foreseeable future throughout all or a

significant portion of its range and any species declining or rare as determined by biological research and inventory and likely to become endangered in the foreseeable future.

(c) Species of Special Concern. The Director shall list as a species of Special Concern any species of plant or animal which has been documented by biological research and inventory to have suffered a decline that could threaten the species if allowed to continue unchecked or that occurs in such small numbers or with such a restricted distribution or specialized habitat requirements that it could easily become threatened within Massachusetts.

(7) Proposals for listing or delisting species. Any person may propose the addition or deletion of species to or from the list, or for changes in classification of listed species. The burden of proof for delisting species shall be on the person requesting such change in status. Proposals must be submitted in writing to the Director and must contain the following information:

(a) the date submitted; the proponent's name, signature, address, and telephone number; and the association, institution, or business, if any, represented by the proponent.

(b) the common and scientific name of the species;

(c) the listing category being proposed;

(d) a detailed justification of the proposed listing or delisting action, including the past and present population status and distribution in Massachusetts, and any known or suspected threats;

(e) information on the known status of the species throughout its range;

(f) supporting documentation (for example, literature citations, copies of written reports, letters from scientific authorities, maps, or species records, if appropriate); and

(g) other information requested by the Director.

(8) Review of Proposals. Within 21 days of receipt of a proposal and after consultation with the Natural Heritage and Endangered Species Program, the Director shall determine whether sufficient evidence has been submitted to warrant a review of the species' status. Upon a determination that sufficient evidence has been submitted, the Director shall refer the proposal to the ~~Nongame~~ **Natural Heritage and Endangered Species** Advisory Committee for its review. The committee, in conducting its review, may seek the advice of additional persons and shall advise the Director concerning appropriate action. The Director may then recommend any changes to the Fisheries and Wildlife Board. Upon a determination that insufficient evidence has been submitted to warrant further review, the Director shall so notify the person proposing the changes in the list and send a copy to the ~~Nongame~~ **Natural Heritage and Endangered Species** Advisory Committee.

(9) Public Hearing. The establishment of the Massachusetts list of Endangered, Threatened, and Special Concern species, and any proposed changes thereto, shall be by regulation after a public hearing subject to the provisions of M.G.L. c. 30A. Not less than 21 days prior to the public hearing, the Director shall make available a summary of the biological data upon which the listing proposal is based. The Director shall submit to the Secretary of EOE in time for publication in the Environmental Monitor at least 21 days prior to the public hearing a notice of such hearing and the availability of such summary of biological data.

(10) List Review Frequency. The Director shall review the list of Endangered, Threatened, and Special Concern species, in consultation with the Nongame Advisory Committee, at least once every five years for the purpose of listing or delisting species.

(11) The List. The official Massachusetts list of Endangered, Threatened, and Special Concern species is found at 321 CMR 10.60 ~~90~~.

#### 10.04 Taking and Possession of Species on State and Federal Lists

(1) Prohibitions. Except as otherwise provided in 321 CMR 10.04(2) and (3), no person may take, possess, transport, export, process, sell or offer for sale, buy or offer to buy, nor shall a common or contract carrier knowingly transport or receive for shipment, any plant or animal or part thereof on the State List or Federal List; provided, however, that ownership, sale, or purchase of real property on which such plant or animal occurs is not prohibited

#### (2) Exemptions.

(a) In Transit. Any person may transport, possess or sell, in accordance with the terms of any necessary state and federal permit, any plant or animal or part thereof on the state list or federal list, which enters Massachusetts from another state or from a point outside the territorial limits of the United States; provided that such plants or animals or parts thereof are lawfully possessed outside of Massachusetts; and provided further that such plants or animals are possessed not more than 24 hours in Massachusetts and are transported through Massachusetts while in transit to another destination outside of Massachusetts. For the purposes of 321 CMR 10.04(2)(a), necessary state and federal permits shall include, but not be limited to, those required under M.G.L. c. 131 and the regulations promulgated thereunder and any other state or federal permit required for the possession or sale of species on the state list or federal list.

(b) Plant Propagation and Nursery Sales. A person may take, possess, propagate, buy, or sell all plants or parts thereof on the state list or federal list in cultivation, provided that such plants or parts thereof are lawfully held under other state or federal laws and shall not have been taken from the wild in Massachusetts after March 27, 1991 or after the time of subsequent listing of said species pursuant to 321 CMR 10.03.

(c) Animal Possession Prior to Effective Date. Any person may possess any animal, or part thereof, on the state list or federal list that was lawfully possessed on March 27, 1991 or at the time of subsequent listing of said species pursuant to 321 CMR 10.03, provided, however, that no such animal, or part thereof, may be sold or traded for value.

(d) Federally authorized uses of species on the Federal List.

1. Any person may, in accordance with all applicable federal laws, possess, sell, buy, or trade any finished products, including but not limited to carvings, clothing, jewelry, and similar goods, made from species on the Federal List.
2. Any person may, in accordance with all applicable federal laws, possess parts of plants or animals on the federal list for ceremonial and religious purposes.

(3) Permits for Taking and Possession of Species. Any violation of a permit is a violation of M.G.L. c. 131A, § 2.

(a) Scientific and Educational Use Permits. The Director may in accordance with provisions of M.G.L. c. 131, § 4 and c. 131A, § 3 permit the taking, possession, purchase, sale, transportation, exportation or shipment of any species on the state list for scientific or educational purposes, including but not limited to scientific collecting, educational use, wildlife rehabilitation, salvage, or bird-banding.

(b) Conservation and Management Permit. The Director may in accordance with provisions of M.G.L. c. 131A, § 3 permit the taking of a species on the state list for conservation or management purposes **pursuant to the criteria and process set forth in 321 CMR 10.22.** ~~provided there is a long-term net benefit to the conservation of the local population of the impacted species.~~

~~If the applicant for a permit has avoided, minimized and mitigated impacts to state listed species to the greatest extent possible, then the Director may issue a permit if he has determined that:~~

- ~~1. an insignificant portion of the local population will be impacted or no viable alternative for the proposed project or activity exists; and~~
- ~~2. a conservation plan, submitted to and approved by the Director, will be carried out that provides a long-term net benefit to the conservation of the local population of the impacted species.~~

~~The permit shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of 321 CMR 10.04(3), including but not limited to, adequate funding for the conservation plan provided by the applicant, and yearly monitoring and reporting of the results of the conservation plan.~~

(c) Captive Propagation of State Listed Species.

1. Animals. The Director may permit, in accordance with provisions of M.G.L. c. 131, § 23, and 321 CMR 2.12, the artificial propagation and maintenance of animals on the State List. Such permits may be issued only after the Director approves a written propagation program prepared by the applicant.

2. Plants. The Director may permit the artificial propagation and maintenance of plants on the State List. Such permits may be issued only after the Director approves a written propagation program prepared by the applicant.

(d) Falconry. The Director may permit the possession, barter or sale of species of raptors listed on the State List or Federal List which have come from captive propagation in compliance with 321 CMR 3.04 and 50 CFR 21, for the purposes of falconry. The Director may permit the taking of Special Concern species for falconry so long as such taking is in accordance with 321 CMR 3.04 and any additional conditions established by the Director designed to insure that such taking does not jeopardize the security of breeding populations of the species within Massachusetts or outside the state.

(e) Public Health. Except as prohibited by federal law, the Director may permit the removal, capture, or destruction of any state listed species to protect human health during the period and within the geographic area of a public health emergency as declared under M.G.L. c. 17, § 2A; provided that the Director has found that all reasonable efforts have been undertaken to avoid the removal, capture or destruction of such species.

(4) Requests for permits and information.

(a) Requests for information regarding a Conservation and Management permit should be sent to: **Environmental Review**, Natural Heritage and Endangered Species Program, Division of Fisheries and Wildlife, Rte. 135, Westborough, MA 01581.

(b) Requests for all other permits should be sent to: Division of Fisheries and Wildlife, 251 Causeway Street, Suite 400, Boston, MA 02114.

10.05 Responsibilities of State Agencies

(1) All state agencies shall utilize their authorities in furtherance of the purposes of MESA and 321 CMR 10.00; review, evaluate and determine the impact on Endangered, Threatened and Special Concern species or their habitats of all works, projects or activities conducted by them; and use all practicable means and measures to avoid or minimize damage to such species or their habitats. For the purposes of 321 CMR 10.05, "state actions" means any work, project, or activity either directly undertaken by a state agency, or if undertaken by a person, which seeks the provision of financial assistance by an agency or requires the issuance of permits by an agency (but not including a grant of aid for medical services or personal support, such as welfare or unemployment funds) to a person or a third party on behalf of a person, and "activities" means any acts carried out by a state agency which could affect any State-listed Species or their habitats.

(2) The following types of state actions shall be considered in compliance with MESA and 321 CMR 10.05(1):

(a) State actions that have received any permits required pursuant to MESA and 321 CMR 10.05(1).

(b) State actions that are part of a project which has been reviewed under MEPA and the Secretary of EOEA has issued either a certificate on an ENF stating that project does not require the preparation of an EIR or a certificate on a Final EIR stating that the EIR fully and adequately complies with MEPA, provided, however, that said project has been reviewed under MEPA regulations (301 CMR 11.00) that have incorporated review thresholds for permits issued under 321 CMR 10.00.

(c) State actions occurring on state-owned land that are in conformance with a management plan which was developed in accordance with the following inventory and planning procedures and management policies:

1. Inventory Procedures. State agencies shall request and the NHESP shall provide information on the location, biology, and habitat requirements of state listed species documented by the NHESP as occurring on said agency's lands. NHESP shall also provide to state agencies such information and recommendations as are necessary to allow said agencies to use all practicable means and measures to avoid or minimize damage to state listed species or their habitats.

2. Planning Procedures. State agencies shall submit to NHESP any draft management plans they prepare for state-owned lands on which State-listed Species are known to occur. NHESP shall review such draft plans and provide comments and recommendations to the state agency concerning the protection, conservation, and restoration of the listed species on the land subject to the plan. Such review and recommendations shall be repeated at least once every five years or every time the land management plan is updated, whichever is sooner.

3. Management Policies. Unless specifically required otherwise by statute, localities on state-owned lands that provide habitat for state listed species shall be managed for the benefit of such listed species. Said agencies shall give management priority to the protection, conservation, and restoration of Endangered, Threatened, and Special Concern species occurring on state-owned lands. All practicable means and measures shall be taken to resolve conflicts between the protection, conservation, and restoration of state listed species on state-owned lands and other uses of such lands in favor of the listed species.

(d) All other state actions that do not require a permit under MESA, are not subject to review under MEPA, and do not involve actions on state-owned lands shall be presumed to be in compliance with 321 CMR 10.05(1), unless the Secretary of EOEA initiates the following review. The Secretary of EOEA may initiate a review of a state action when he/she determines that such a state action may damage state listed species or their

habitats. Such state actions for which the Secretary has initiated such review and which fulfill the consultation and review procedures described below shall be considered in compliance with 321 CMR 10.05(1):

1. Upon notification by the Secretary of EOEA that a state action may damage state listed species or their habitats the affected agency shall initiate consultation with NHESP. Said agency shall submit to NHESP such information that is necessary for the NHESP to determine the location and nature of the proposed state action.
2. NHESP shall review the information submitted by the agency and determine if the state action is likely to result in damage to any state listed species or their habitats. If the NHESP determines that the state action is likely to damage state listed species or their habitats the NHESP shall provide to the agency such guidance and information that is necessary to allow the agency to avoid such damage. If NHESP determines that the state action is not likely to result in damage to state listed species or their habitats the NHESP shall provide a written opinion to the agency that such state action is in compliance with MESA and 321 CMR 10.05(1). An agency that receives guidance and information from NHESP regarding the avoidance of damage to state listed species and their habitats shall take all practicable means and measures to modify their actions to avoid such damage.
3. Said agency shall submit to the Secretary of EOEA and NHESP evidence that all practicable means and measures have been taken to avoid damage to state listed species and their habitats. The Secretary shall certify that the state action is in compliance with 321 CMR 10.05(1) if he finds that the agency has taken all practicable means and measures to avoid damage to state listed species and their habitats pursuant to the recommendations of NHESP.

#### 10.06 Penalties

(1) Unauthorized taking, possession, and sale of species on the State or Federal lists. Any person who violates the provisions of the first paragraph of M.G.L. c. 131A, § 2 or 321 CMR 10.04 or 10.11 through 10.24 shall be punished by a fine of not less than \$500 or imprisonment for not more than 90 days or both such fine and imprisonment. Upon a second or subsequent conviction such person shall be punished by a fine of not less than \$5,000 nor more than \$10,000 or by imprisonment for not more than 180 days or both such fine and imprisonment.

(~~3~~2) Unauthorized Alteration of Significant Habitat. Any person who violates the provisions of the second paragraph of M.G.L. c. 131A, § 2 or 321 CMR 10.34 ~~61~~(1) shall be punished by a fine of not less than \$1,000 nor more than \$10,000 or by imprisonment for not more than 90 days or both such fine and imprisonment. Upon a subsequent conviction, such person shall be punished by a fine not less than \$10,000 nor more than \$20,000 or by imprisonment for not more than 180 days or both such fine and imprisonment. In addition or as an alternative to such penalties, any such person may be ordered to restore the Significant Habitat to its prior condition.



(3) Civil Penalties. Any person who violates M.G.L. c. 131A, s. 2 or any rule or regulation adopted thereunder shall be subject to a civil assessment not to exceed \$10,000 for each such violation.

(24) Multiple Violations. The commission of an act prohibited by M.G.L. c 131A or any rule or regulation adopted thereunder with respect to each individual animal or plant, or part thereof, shall constitute a separate offense ~~violation of MESA~~.

#### 10.07 Addresses

For the Director and Division: Massachusetts Division of Fisheries and Wildlife, 251 Causeway Street, Suite 400, Boston, MA 02114.

For the Natural Heritage and Endangered Species Program: Natural Heritage & Endangered Species Program, Division of Fisheries and Wildlife, Route 135, Westborough, MA 01581.

### **PART II: PRIORITY HABITAT DELINEATION, REVIEW OF ACTIVITY OR PROJECTS, EXEMPTIONS, AND APPEAL**

#### 10.11 Introduction

Part II of 321 CMR 10.00 establishes the criteria for the delineation of Priority Habitat, establishes standards and procedures for determining which Projects or Activities are located, or will take place, in Priority Habitat, review procedures and performance standards for determination of whether a Project or Activity will result in a Take, and performance standards, requirements necessary to obtain a Conservation and Management Permit from the Director, and appeal procedures. Exempt Projects and Activities are defined in 321 CMR 10.14. Persons or entities undertaking Projects or Activities not exempt from review shall submit those Projects or Activities to the review process set forth in 321 CMR 10.18 or, where applicable, shall request Division review in coordination with MEPA review.

#### 10.12 Delineation of Priority Habitat of State-listed Species

(1) Priority Habitats are used for screening Projects and Activities that may result in the Take of state-listed species and to provide guidance to Record Owners regarding a Project or Activity through consultation with the Division. Priority Habitats shall be delineated based on the Best Scientific Evidence Available.

(2) The delineation of Priority Habitat by the Division for all state-listed species shall be based on the Best Scientific Evidence Available and shall include examination of



individual occurrence records in the context of species listing status, and shall apply the following criteria:

- (a) The nature and/or significance of the occurrence as it relates to the conservation and protection of the species, including but not limited to, evidence of breeding, persistence, life stages present, number of individuals, extent of necessary supporting habitat, and proximity to other occurrences;
- (b) The quality of the evidence collected by or submitted to the Division to document the occurrence.

(3) For each species, habitat mapping guidelines will be prepared that identify the important habitat features, and that describe how and why Priority Habitats are delineated

(4) Where the delineation will extend to areas previously disturbed by Projects or Activities, the delineation shall to the maximum extent feasible and consistent with the Best Scientific Evidence Available and to the extent that they no longer provide important habitat features for State-listed Species, exclude any such disturbed areas from the delineated Priority Habitat.

(5) In the delineation of Priority Habitat and the selection of occurrence records to be included in Priority Habitat mapping, the Division shall take into consideration the listing status of individual species and use a methodology that draws clear distinctions between state-listed species based on the relative threat of extinction or extirpation for each of those classifications. The delineation shall be shown on maps prepared by the Division and made publicly available as provided in 312 CMR 10.00.

(6) Promptly after completion, the Division shall provide the Priority Habitat map to planning boards, conservation commissions, boards of selectmen or mayors and city councils, and regional permit granting commissions in those cities and towns where Priority Habitat exists. The Priority Habitat Map shall also be made available electronically as a data layer for state GIS mapping.

(7) The delineation of Priority Habitat will be re-evaluated every two years by the Division. The Division shall within 60 days of that re-evaluation publish an updated version of the Priority Habitat Map reflecting (a) any revisions to the delineation resulting from Division's re-evaluation and (b) any revisions to the delineation made in the preceding two years in response to a request for reconsideration or appeal. The updated version of the Priority Habitat Map shall be published as provided in 321 CMR 10.12(6).

(8) Any Record Owner of property in Priority Habitat may request reconsideration by the Division of the delineation affecting that Record Owner's property. Such request shall be made in writing by certified mail to the Division. Within 30 days of the Division's receipt of a request for reconsideration, the Division shall make available to

the Record Owner requesting reconsideration all records, consistent with the provisions of M.G.L. c. 66 § 17D, in the Division's files relating to the delineation and species listing affecting that property. In providing such records, the Division may require the Record Owner to execute a confidentiality agreement pursuant to M.G.L. c. 66 §17D and redact the names of persons submitting state listed species occurrence information affecting a property

A request for reconsideration shall include the following information:

- (a) Name;
- (b) Address;
- (c) Ownership interest in the property;
- (d) Acreage of the property;
- (e) A copy of a USGS topographic map in scale 1:24,000 or 1:25,000 with the property location clearly marked and centered on the page, and;
- (f) A clear statement explaining the reasons for the reconsideration request with specific reference to scientific studies, records, surveys or other information relevant to the request.

Within 45 days of its receipt of such information, the Division shall, applying the criteria in 321 CMR 10.12(2), issue a written decision either confirming the original delineation, or, modifying that delineation as the Division determines is warranted by the additional information submitted to the Division. The decision shall state the grounds for the Division's determination, and shall be mailed by certified mail to the Record Owner who requested the reconsideration. This decision shall be considered the final agency action for the purposes of c. 30A. No Record Owner may appeal the delineation in the Priority Habitat Map pursuant to c. 30A without first requesting reconsideration as provided above. However, the failure to request reconsideration shall not preclude a Record Owner from challenging the Priority Habitat delineation in connection with the review of a Project or Activity pursuant to 321 CMR 10.18.

#### 10.13 Projects Not in Priority Habitat

(1) Projects and Activities that are not located or will not take place in Priority Habitats shall not be subject to the review provision of 321 CMR 10.18, except as provided in 321 CMR 10.13(2), or if, prior to the issuance of a final order of conditions by the conservation commission, or if not subject to the jurisdiction of the conservation commission, then after the issuance of any permit that has been subject to public hearing that was publicly noticed, or if not subject to such a public hearing then 30 days after the issuance of a building permit, new information on a State-listed Species occurrence is

received by the Division relating to the site of a proposed Project or Activity. The Division shall determine whether the new state listed species occurrence meets the criteria for delineation of a Priority Habitat under 321 CMR 10.12, and, whether the proposed Project or Activity shall be reviewed under 321 CMR 10.18. Within 30 days of the receipt of such occurrence information, the Division's determination shall be provided in writing to the Record Owners(-s) of the site(-s) where the Project or Activity is proposed. Any determination provided under 321 CMR 10.13 shall remain valid for a period of three years after the date of its issuance.

(2) For Projects or Activities that are subject to MEPA review pursuant to c. 30, § 61 through 62H, the following provisions shall apply:

(a) The Division may review and comment on any Environmental Notification Form, Environmental Impact Report, draft Environmental Report or Notice of Project Change submitted to the MEPA Office. If the Division has credible information indicating the occurrence of a state-listed species or its habitat within the area to be disturbed by the Project or Activity, the Division may request in its comments to the MEPA Office that the project proponent be required to assess the area to be disturbed by the Project or Activity to determine if state-listed species are present. Otherwise, the Priority Habitat Map in effect as of the time of the Division's review of the Environmental Notification Form or Notice of Project Change shall be deemed final for the purpose of the Division's review.

(b) Following the issuance of a certificate by the Secretary of Environmental Affairs for the final stage of review for a Project or Activity any determinations made in or pursuant to that certificate with respect to the delineation of Priority Habitat or avoiding, minimizing and mitigating the Take of state-listed species, provided there is no material change in the Project or Activity, shall remain valid for the purposes of 321 CMR 10.00 for a period of three years.

(3) A Record Owner may at any time undertake a voluntary assessment following protocols pre-approved in writing by the Division to determine if species of special concern are present on a property (or portion thereof). Upon approval of that assessment by the Division, that assessment shall remain valid for the purposes of 321 CMR 10.00 Part II for a period of three years from the date of its approval in writing by the Division. The approval by the Division of an assessment which does not document the presence of any State-listed Species, their habitat, or land necessary to maintain essential habitat features and functions, provides the Record Owner with a guarantee that no new records of a Special Concern Species will be considered in relation to a MESA or MEPA review of the property for a period of three years. This guarantee does not include any species that is newly listed.

#### 10.14 Exemptions from Review for Projects or Activity in Priority Habitat

The following Projects and Activities shall be exempt from the requirements of 321 CMR 10.18 through 10.23:

(1) Agriculture and Aquaculture. The normal maintenance and improvement of land in agricultural or aquacultural use. This exemption shall continue only so long as such land remains in agricultural or aquacultural use. Land in agricultural or aquacultural use does not include those portions of a site that are not in such use and are not designated fallow land. The normal maintenance and improvement of land in agricultural or aquacultural use does not include site preparation for purposes of conversion to another, non-agricultural or non-aquacultural use. To qualify for this exemption, land in agricultural use shall have been in such use and not fallow or inactive three out of five years preceding the effective date of delineation and adoption of Priority Habitat. To maintain this exemption land in agricultural use must remain in such use but may lie fallow for a period of time if used for agriculture at least three out of every five years. Land lying fallow more than two out of five years shall qualify or continue to qualify for this exemption upon certification by the Commissioner of the Department of Agricultural Resources that the fallow condition of the land is necessary to maintain the land in agricultural use;

(2) Land in forestry use. The normal maintenance and improvement of land in forestry use for which the landowner has complied with the special approval procedures for areas including state listed species pursuant to the Forest Cutting Practices Act, M.G.L. c. 132, § 40 et seq., and 304 CMR 11.04 (6);

(3) the routine maintenance, repair, or replacement, the vertical expansion, or additions that do not exceed 20% of the footprint of existing commercial buildings, multifamily and mixed use structures within existing maintained lawns or landscaped areas;

(4) the routine maintenance, repair, or replacement, the vertical expansion, or additions that do not exceed 50% of the footprint of an existing single family or two family home within existing maintained lawns or landscaped areas;

(5) construction of sheds and other out-buildings within existing maintained lawns or landscaped areas;

(6) construction, repair, replacement or maintenance of septic systems and sewer lines, wastewater treatment systems, or water supply wells within existing maintained lawns or landscaped areas;

(7) the installation of utility lines (gas, water, sewer, phone, electrical) within ten feet from the edge of existing paved roads;

(8) the routine maintenance, repair or replacement, but not widening, of existing paved roads, paved driveways, and paved parking areas, but not including those on barrier beaches, coastal beaches, coastal dunes, or salt marshes, as defined by the Massachusetts Wetlands Protection Act (c. 131 § 40) and 310 CMR 10.00, and not including actions that are likely to result in changes in storm water drainage, and;

(9) the routine maintenance or replacement but not the expansion of existing lawns and landscaped areas.

(10) performance of customary land surveying activities, wetland resource area delineations, environmental assessments and investigations performed in accordance with M. G. L. c. 21E, and other customary preliminary site investigations

#### 10.15 Emergencies

Any person requesting permission to do an emergency Project or Activity shall specify to the Director why the Project or Activity is necessary for the protection of the health or safety of the citizens of Massachusetts and what agency of the Commonwealth or political subdivision thereof is to perform the project or activity, or has ordered the Project or Activity to be performed. If the Project or Activity is approved by the Director as an emergency, the approval shall include a description of work which is to be allowed and the duration of the work, and shall not include work beyond that necessary to abate the emergency. Upon completion of an emergency Project or Activity, the authorized person shall file a written report with the Director detailing the work that was done under this emergency authorization and a description of any restoration that may be necessary to restore the site of the Project or Activity.

#### 10.16 Project Segmentation

Projects shall not be segmented or phased to evade or defer the review requirements of 321 CMR 10.18 through 10.23. For the purposes of 321 CMR 10.18 through 10.23, the entirety of a proposed Project subject to review, including likely future expansions, shall be considered, and not separate phases or segments thereof. In determining whether two or more segments or components are in fact parts of one Project, all circumstances shall be considered, including but not limited to time interval between phases, whether the segments or components, taken together, constitute a part of a common plan or scheme, and whether environmental impacts are separable. Ownership by different entities does not necessarily indicate that two segments or components are separate.

#### 10.17 Requests for State-listed Species Information

(1) Whether a Project or an Activity is within or encroaches upon a Priority Habitat shall be determined by consulting the Priority Habitat Map, which shall be the authoritative delineation of the boundaries of said Priority Habitat.

(2) A Record Owner of land in Priority Habitat may submit a written request to the Division for:

- (a) list of state listed species occurring in the Priority Habitat located on that Record Owner's property, and;

(b) a determination by the Division whether the proposed Project or Activity will occur in the Priority Habitat.

(3) The Division shall respond in writing to such requests within 30 days of receipt of all information required by 321 CMR 10.17(4).

(4) All requests made under 321 CMR 10.17(2) above shall include the following information:

(a) Name;

(b) Address;

(c) Ownership interest in the property;

(d) Acreage of the Property, and;

(e) A copy of a USGS topographic map in scale 1:24,000 or 1:25,000 with the property location clearly marked and centered on the page.

#### 10.18 Review of Projects or Activities for Take of State-listed Species in Priority Habitat

(1) Except as provided in 321 CMR 10.13 and 10.14, any Project or Activity that will be located or will take place in Priority Habitat shall be reviewed by the Division as provided in this section prior to commencement of any physical work or action in Priority Habitat. The Division shall review any such Project or Activity for the purposes of determining if a Take will result from any temporary or permanent modification, degradation or destruction of Priority Habitat occurring as a result of the proposed Project or Activity. Prior to the commencement of any physical work in Priority Habitat, the Record Owner of the land where such Project or Activity will occur shall submit the information listed in 321 CMR 10.20 to the Division. The Division shall notify the Record Owner within 30 days if the materials submitted satisfy 321 CMR 10.20 and request submission of any missing materials. Once the Division has received all of the materials required by 321 CMR 10.20, the Division shall issue a file number for the review of that Project or Activity.

(2) After the issuance of a file number, the Division shall review the submitted materials to determine, based on the performance standard in 321 CMR 10.19, if the proposed Project or Activity either (a) has avoided a Take as proposed, or with conditions and may proceed without further review or (b) will result in a Take and cannot proceed as proposed. For purposes of M.G.L. c. 30A §§ 10 through 14, the determination of a Take shall constitute final agency decision in the form of a denial. The Division's determination shall be made in writing within 60 days after the issuance of a file number. Failure of the Division to issue a written determination within 60 days after the issuance of a file number shall be deemed to be a determination that the proposed Project or Activity does not result in a Take and requires no further review. The Director may

extend the 60-day review period for up to two successive 20 day periods if circumstances beyond the control of the Division require additional time to complete the review, in which case the Division shall notify the Record Owner in writing of the extension and the reason for the extension. The response time may also be extended at the written request of the Record Owner.

(3) If the Division has made a determination of a Take, the Record Owner may request a consultation with the Division to discuss options for the Project or Activity that may avoid a Take.

(4) Any Project or Activity that receives a determination that no Take will result (whether in writing or by expiration of the 60-day review period, as may be extended) shall not be subject to further review under 321 CMR 10.18 if physical work on the Project or Activity is commenced within three years from the date of the determination (or the expiration of the 60-day review period, as may be extended). If no physical work is commenced on the Project or Activity within that three-year period, or there is a material change in the plans that were submitted to the Division, the Project or Activity may be subject to further review by the Division.

#### 10.19 Performance Standards for Avoidance of Take of State-listed Species

Project proponents must demonstrate that the proposed Project or Activity does not result in a take, as defined in 321 CMR 10.04.

#### 10.20 Project Filing Requirements

The following information must be submitted to the Division in order to commence review pursuant to 321 CMR 10.18. Based on the information provided by the Record Owner, the Division shall determine whether or not the proposed Project or Activity will result in a Take.

##### (1) Projects or Activities impacting less than ten acres

(a) Name;

(b) Address;

(c) Ownership interest in the property;

(d) Acreage of the property;

(e) A copy of a USGS topographic map in scale 1:24,000 or 1:25,000 with the property location clearly marked and centered on the page;

(f) Size of the project impact;

- (g) Assessor's map of the site;
- (h) Project plans with existing and proposed conditions;
- (i) Project description, and;
- (j) Photographs representative of the site.

The Division may at its discretion request additional information beyond that described above, on a case by case basis such as, but not limited to, species surveys, wetland reports, soil map and reports, and stormwater management reports.

(2) Projects or Activities impacting ten acres or more

- (a) Name;
- (b) Address;
- (c) Ownership interest in the property;
- (d) Acreage of the property;
- (e) A copy of a USGS topographic map in scale 1:24,000 or 1:25,000 with the property location clearly marked and centered on the page;
- (f) Size of the project impact;
- (g) Assessor map of the site;
- (h) Project plans with existing and proposed conditions;
- (i) Project description;
- (j) Photographs representative of the site;
- (k) A vegetation cover type map of the site;
- (l) Description of hydrology;
- (m) The mapped extent of State-listed Species habitat on the project site, and;

The Division may at its discretion request additional information beyond that described above, on a case by case basis such as, but not limited to, species surveys, wetland reports, soil map and reports, and stormwater management reports.



### 10.21 Denial and Appeal

Record Owners for Projects or Activities that the Division has determined under 321 CMR 10.18 will result in a Take may either apply to the Director for a Conservation and Management Permit as provided in 321 CMR 10.23, or appeal the decision as provided in 321 CMR 10.25.

### 10.22 Extension of a Determination

- (a) The Director may extend a determination made under 321 CMR 10.14 or 10.18 for a period of up to three years. Request for an extension shall be made in writing to the Director at least 60 days prior to the expiration of the determination.
- (b) The Director may deny the request for an extension and require a review for the remaining work in the following circumstances:
  - 1. where no work has begun on the project, except where such failure is due to an unavoidable delay, such as appeals, in the obtaining of other necessary permits;
  - 2. where new information, not available at the time the original determination was issued, has become available and indicates that the determination is not adequate to protect the interests identified in M.G.L. c. 131 A or
  - 3. where incomplete work is causing damage to the interests identified in M.G.L. c. 131 A or
  - 4. where work has been done in violation of the determination or 321 CMR 10.00.

### 10.23 Conservation and Management Permit

(1) The Director may in accordance with provisions of M.G.L. c. 131A, § 3 permit the Taking of a State-listed Species for conservation or management purposes provided there is a long-term net benefit to the conservation of the impacted species.

(2) If the Director determines that the applicant for a permit has avoided, minimized and mitigated impacts to State-listed Species consistent with the following performance standards, then the Director may issue a Conservation and Management Permit:

- (a) The applicant has adequately assessed alternatives to both temporary and permanent impacts to State-listed Species;
- (b) An insignificant portion of the local population would be impacted by the Project or Activity, and;
- (c) The applicant agrees to carry out a conservation and management plan that provides a long-term Net Benefit to the conservation of the State-listed Species

that has been approved by the Director, as provided in 321 CMR 10.23(5), and will be carried out by the applicant.

(3) If a conservation and management permit implemented by an applicant is unable to meet the long-term Net Benefit performance standard on the project site and the applicant has made every reasonable effort to avoid, minimize and mitigate impacts to the State-listed Species on site, the conservation and management plan may with the approval of the Director, be designed to provide for financial or in-kind contribution toward the development and/or the implementation of an offsite conservation recovery and protection plan for the affected species.

(4) The conservation and management permit if and when issued shall contain such terms and conditions as the Director deems necessary or appropriate to carry out the purposes of 321 CMR 10.04(3), including but not limited to, adequate funding for the conservation and management plan provided by the applicant, and appropriate monitoring and reporting of the results of the conservation and management plan. After being notified in writing, and confirming that the terms of a conservation and management permit have been fulfilled, the Division will issue a certificate of compliance.

(5) Within 30 days of the receipt of a final conservation and management plan and after the issuance of a final MEPA certificate, the Director shall make a determination that the submitted plan meets the performance standards and is approved or a determination that the plan as submitted is inadequate and is denied. Failure of the Director to respond to the final conservation and management plan shall constitute approval of the submitted plan. The 30 day response time may be extended for two successive 30 day periods by the Director due to circumstances beyond the control of the Division and the applicant shall be notified in writing of the extension, its period and the reason for the extension.

#### 10.24 Effective Date of Priority Habitat and Conservation and Management Amendments

Amendments to the definition of the terms “Alter”, “Best Scientific Evidence Available”, “Capacity of a Designated Significant Habitat to Support a Population of Endangered or Threatened Species”, “Priority Habitat”, “Project of Activity”, “Record Owner”, and “Take”, as set forth in 321 CMR 10.02, to regulations concerning “Permits for the Taking and Possession of Species, as set forth in 321 CMR 10.04(3), and to regulations concerning “Delineation of Priority Habitat and Review of Activity or Projects within Priority Habitat” as set forth in 321 CMR 10.11 through 10.24, shall take effect following the approval by the Secretary of Administration and Finance of fees for environmental review under 321 CMR 10.00, and the publication of said fees in the *Massachusetts Register* and 801 CMR 4.00, and shall apply to any then pending requests for information or applications for a Conservation and Management Permit. The most recently published Priority Habitat maps available at the time of these regulatory amendments will be the maps used for purposes of these regulations. Changes to Priority Habitat maps will follow guidelines set forth in 321 CMR 10.12. Any person who, prior to the publication of notice of hearing of amendments to the provisions of Part II of 310 CMR 10.00, requested and

obtained a determination from the NHESP Program that the Program is not aware of any endangered, threatened or special concern species on the subject land or that the proposed location of the project does not lie near any estimated or priority habitats, and such determination shall continue to be effective for a period of three years from the effective date of these regulatory amendments.

#### 10.25 Appeal Process

(1) Adjudicatory Hearing Before the Division. Any person aggrieved by a final agency decision made pursuant to 321 CMR 10.12, 10.18 or 10.23 shall have the right to an adjudicatory hearing at the Division pursuant to M.G.L. c. 30A, § 11 in accordance with the procedures for informal hearings set forth at 801 CMR 1.02 and 1.03.

(2) Any notice of claim for an adjudicatory hearing must be made in writing and be accompanied by a filing fee as determined by the Division and the Executive Office of Administration and Finance, and be sent by certified mail or hand delivered to the Division, and postmarked within 21 days of the date of the agency final decision.

(3 ) Any notice of claim for an adjudicatory hearing shall include the following information:

(a) the file number of the project;

(b) the complete name, address and telephone number of the person filing the request; the name, address and telephone number of any authorized representative; and the specific facts that demonstrate that a party filing a notice of claim satisfies the requirements of an "aggrieved person," including but not limited to how they have a definite interest in the matters in contention within the scope of interests or area of concern of M.G.L. c. 131A or the regulations at 321 CMR 10.00 and have suffered an actual injury which is special and different from that of the public and which has resulted from violation of a duty owed to them by the Division;

(c) a clear statement that an adjudicatory hearing is being requested;

(d) a clear and concise statement of facts which are grounds for the proceeding, the specific objections to the actions of the Division and the basis for those objections, and the relief sought through the adjudicatory hearing; and

(e) a statement that a copy of the request has been sent by certified mail or hand delivered to the applicant and the Record Owner, if different from the applicant.

(4) The presiding officer in an adjudicatory proceeding at the Division may allow a person who demonstrates, as required by 321 CMR 10.25(3)(b), that they are aggrieved to join or intervene in the adjudicatory proceeding.

(5) Judicial Review under Chapter 30A. Any person aggrieved by any final decision of the Division made under 321 CMR 10.12, 10.18, or 10.23 in an adjudicatory proceeding shall be entitled to judicial review in accordance with the provisions of M.G.L. c. 30A, § 14.

### **PART III: DESIGNATION OF SIGNIFICANT HABITAT**

#### **10.41 30 Designation of Significant Habitat**

(1) Purpose. Listed species are frequently restricted in their occurrence to rare, reduced, or specialized habitat types. Consequently, listed species may be jeopardized if their habitat areas are threatened by direct or indirect habitat-altering activities. The types of habitat which presently harbor state listed species are diverse and may include, but are not limited to: coastal plain kettle ponds, sandplain grasslands, limestone wetlands, vernal pools, pitch pine/scrub oak barrens, coastal heathlands, floodplain forests, estuaries, barrier beaches, and marshes with emergent vegetation.

(2) Designation process. The designation of a Significant Habitat shall consist of a review of biological data, a designation proposal, notice and public hearing, a review of the proposed designation, and the Director's finding and designation.

#### **10.42 31 Designation Proposal**

On an annual basis, the Director shall consult the records of the Natural Heritage and Endangered Species Program and shall propose for designation as Significant Habitats those areas for which, in his judgment, there is sufficient scientific evidence that the area contains physical or biological features important to the conservation of one or more Endangered or Threatened species populations and which may require special management considerations or protection.

#### **10.43 32 Notice and Public Hearing**

(1) Notice of Public Hearing. Before designating an area as Significant Habitat, the Director shall first give notice, as provided below, of a public hearing. Not less than 30 days prior to the public hearing, notice shall be sent:

(a) by certified mail to record owners of lands or interests in lands containing habitat proposed to be designated;

(b) by first class mail to boards of selectmen, town managers, city councils, or mayors; regional permit granting agencies; zoning boards; planning boards; and conservation commissions of towns or cities in which the habitat is located; and

(c) at the Director's discretion, to other interested citizens, agencies, and organizations.

The Director shall give notice by mail to any person who has filed a written request to receive the notice of said public hearing to be held under these regulations at least 14 days prior to the date of the public hearing. Any of the notices required to be given pursuant to these regulations shall be deemed to have been given upon mailing a copy of the notice.

(2) Publication of Notice. The Director shall submit the notice to the Secretary of EOEa in time for publication in the Environmental Monitor at least 21 days prior to the public hearing. The Director shall also publish notice of the public hearing at least 21 days prior to the date of the public hearing in a newspaper of general circulation in the vicinity of the proposed area and in such appropriate trade, industry, informational, or professional publications as he may choose.

(3) Filing Notice With the Secretary of State. The Director shall file notice of the public hearing with the Secretary of State at least 21 days prior to the date of the public hearing.

(4) Special Notice to Landowners. Notice to landowners shall include: a citation of authority under which the designation would occur; a general description of the area proposed for designation, copies of pertinent sections of M.G.L. c. 131A and 321 CMR 10.00 30; a summary of the reasons for such designation; a map of the approximate area to be designated; the time and place of the public hearing, and the method by which persons may make their views known.

(5) Public Hearing. The Director and the Fisheries and Wildlife Board shall hold a public hearing prior to designating an area as Significant Habitat. The hearing must be held within 25 miles of the area proposed for designation or at the nearest location where a suitable facility exists. The chairman of the Fisheries and Wildlife Board or his designee shall conduct the public hearing. A summary of the reasons for the designation and a map of the approximate area to be designated shall be made available to the public not less than 21 days prior to the date of the public hearing.

#### 10.44 33 Review of Proposed Designation.

Prior to designating an area as Significant Habitat, the Director shall review the information presented at the public hearing, any written comments submitted within 21 days after the public hearing, and any other information the Director deems appropriate, and shall take into consideration the following:

- (1) the size of the population, as evidenced by current estimates of the number of individuals in the population of the Endangered or Threatened species;
- (2) the current and foreseeable uses of the land or water, as evidenced by its existing condition; existing roads, structures, and other improvements; proposed uses and improvements; zoning status; existing easements, encumbrances and other restrictions on the use of the land or water; and other regulatory constraints;

(3) the current and foreseeable threats to the population or its habitat, as evidenced by existing or proposed activities that may impact or fragment the habitat such as: landform alterations; pollution of surface, ground, or marine waters; alteration of the hydrology; proposals for development projects; and plans for infrastructure developments such as sewers, water systems, and roads; or regional growth trends; and

(4) the potential benefits of designation to the population and to the status and welfare of the species generally, as evidenced by how designation will help further the conservation of the population and of the species generally in the state.

#### 10.45 ~~34~~ Director's Finding and Designation.

(1) Decision. Within 60 days of the public hearing held pursuant to 321 CMR 10.43 ~~32~~, the Director shall make a final decision, with the approval of the Fisheries and Wildlife Board and the advice of the ~~Nongame~~ **Natural Heritage and Endangered Species** Advisory Committee, whether to designate a proposed area as Significant Habitat. The Director shall decide in favor of designating a proposed area as Significant Habitat upon finding that, on the basis of the best scientific evidence available, the area contains physical or biological features important to the conservation of an Endangered or Threatened species population and, on the basis of the factors listed in 321 CMR 10.44 ~~33~~, the area requires special management considerations or protection, and therefore is a Significant Habitat of Endangered or Threatened species.

(2) Preparation of Designation Regulation. Upon making a final decision to designate an area as Significant Habitat, the Director shall prepare for filing with the Secretary of State a regulation establishing said area as Significant Habitat, which regulation shall be in the form of an addition to 321 CMR 10.70 ~~99~~ (~~the Designated Significant Habitats regulation~~).

(3) Specifications. The Director may specify in the designation regulation certain activities which may or may not alter the Significant Habitat; provided, however, that the Director may specify that such activity shall be considered an alteration, but that the Director may not specify that a categorical alteration under 321 CMR 10.33 ~~63~~(1) shall be considered a non-alteration.

(4) Designation Document. Upon making a final decision to designate an area as Significant Habitat, the Director shall prepare a Designation Document. The Designation Document shall include a general description of the area to be designated, a summary of the reasons for such designation, a citation of authority for the designation, a copy of the designation regulation as submitted to the Secretary of State, and a map or aerial photograph showing the boundaries of the designated Significant Habitat described by metes and bounds or another adequate method.

(5) Decision to not designate. Upon making a final decision not to designate an area as Significant Habitat, the Director shall prepare a notice of such decision together with a description of the reasons for not designating the Significant Habitat. The Director shall

distribute said notice to those persons and publications which received the public notice of the public hearing.

(6) Notice of Director's Finding. Upon making a final decision to designate or not to designate an area as Significant Habitat, the Director shall submit a notice of such decision to the Secretary of EOEA for publication in the Environmental Monitor.

~~10.46~~ **35** Filing of Designation Regulation and Effective Date.

No later than seven days after making a decision to designate, the Director shall submit a copy of the designation regulation to the Secretary of State for publication in the Massachusetts Register. The effective date of any designation shall be the date of publication in the Massachusetts Register.

~~10.47~~ **36** Distribution of and Availability of Designation Document.

The Director shall make the Designation Document available for inspection by the public in the Division's office at 251 Causeway Street, Suite 400, Boston, MA, during regular business hours. The Director shall send by first class mail such Designation Documents to zoning boards of appeals, planning boards, conservation commissions, municipal departments of public works, and the boards of selectmen or mayors and city councils, in those communities where the Significant Habitat which is the subject of the Designation Document is located, appropriate regional permit granting commissions, and by certified mail to record owners within seven days of the Director's decision under 321 CMR 10.45 **34**.

~~10.48~~ **37** Recording of Designation.

Within 180 days of the effective date of a regulation designating Significant Habitat, or within 30 days after the secretary's finding under 321 CMR 10.49 **38**(2) on any pending appeal, whichever is later, the Director shall prepare a Recording Document identifying the location of the Significant Habitat, together with a list of the record owners of such Significant Habitat, which shall be recorded in the proper registry of deeds or, if the land containing Significant Habitat is registered land, in the appropriate registry district of the land court. The Director shall send a copy of the Recording Document by certified mail to each record owner.

~~10.49~~ **38** Appeals of Significant Habitat Designations.

(1) Process. Within 21 days of the effective date of a regulation designating Significant Habitat, record owners of lands or interests in lands containing such Significant Habitat may appeal the Director's designation by sending a notice of appeal by certified mail to the Secretary of EOEA. The Secretary shall hold a hearing on such appeal within a reasonable time, and in no case later than 120 days after the effective date of the regulation designating the Significant Habitat, and shall make a determination thereon within 60 days of the hearing.



(2) Standard of review. The Secretary of EOEa shall reverse a designation of the Director only upon a finding that the designation was without substantial basis in fact. For the purposes of 321 CMR 10.49 38, “without substantial basis in fact” shall mean that there is no credible scientific information in the record that supports the Director's finding and designation under 321 CMR 10.45 34.

(3) Reversal of Designation. Upon the reversal of a designation the Director shall rescind the regulation or a part thereof, which established such designation, as it affects the appealing record owner, and shall file with the registry of deeds or land court, as appropriate, a recordable document indicating said rescission if a Recording Document previously had been filed with respect to the land.

#### 10.20 39 Petition to Purchase Significant Habitat.

In addition to the procedures specified in 321 CMR 10.49 38, within 21 days of the effective date of a regulation designating Significant Habitat, record owners of land which has been designated as Significant Habitat may petition the Director to consider purchasing either the affected portion or the entire parcel of land upon which the Significant Habitat is located with monies appropriated by the general court or from bond funds.

#### 10.21 40 Review and Revision of Significant Habitat Designations.

The Director shall review designated Significant Habitats on a yearly basis and may, from time to time, revise such designations by designating additional areas as Significant Habitat or undesignating areas that no longer warrant designation. Such revisions shall be treated as new designations and subject to the procedures at 321 CMR 10.42 31 through 10.49 38.

### **PART IV: ALTERATION OF SIGNIFICANT HABITAT**

#### 10.30 60: Introduction ~~Alteration of Significant Habitat~~

Part ~~III~~ IV of 321 CMR 10.00 applies to activities within designated Significant Habitat and is promulgated in addition to those regulations set forth in Parts I, II, and ~~IV~~ V of 321 CMR 10.00. Part ~~III~~ IV of 321 CMR 10.00 establishes rules and procedures for determining which activities are alterations of Significant Habitat and therefore need to obtain an alteration permit from the Director. Activities which are exempted from any review are also defined. Part ~~III~~ IV of 321 CMR 10.00 establishes rules and procedures for the review of alterations in Significant Habitats. Permits may be sought through either a standard review process or through procedures coordinated with the MEPA process or the Department of Agricultural Resources' Rights-of-Way Management program.

#### 10.31 61: Activities Within Significant Habitat



(1) General Rule. Except as otherwise provided, no person may undertake any activity that constitutes an alteration of a Significant Habitat without a written Alteration Permit issued by the Director.

(2) Activities Which Require an Alteration Permit. An activity requires an Alteration Permit before commencing if the activity:

- (a) will occur within a Significant Habitat;
- (b) is not exempted by 321 CMR 10.32 62; and
- (c) is an alteration of Significant Habitat, as determined by:

- 1. the categorical list of alterations under 321 CMR 10.33 63(1);
- 2. the list of alterations specified in 321 CMR 10.30 the Significant Habitat designation regulation; or
- 3. the Director under 321 CMR 10.34 64.

(3) Activities That Do Not Require an Alteration Permit. An activity does not require an Alteration Permit before commencing if the activity:

- (a) will not occur within a Significant Habitat;
- (b) is exempted under 321 CMR 10.32 62; or
- (c) is not an alteration of Significant Habitat, as determined by:

- 1. the categorical list of non-alterations under 321 CMR 10.33 63(2);
- 2. the list, if any, of non-alterations specified in the Significant Habitat designation regulation (321 CMR 10.00 30, Part H III); or
- 3. the Director under 321 CMR 10.34 64.

(4) Determining Whether an Activity Will Occur in a Significant Habitat.

(a) A person may determine whether an activity will occur in a Significant Habitat by consulting the descriptions of Significant Habitats at 321 CMR 10.70 99, which shall be considered the authoritative description of the boundaries of said Significant Habitat. Maps showing the approximate location of Significant Habitats shall be available for inspection at the NHESP and shall have been mailed, pursuant to 321 CMR 10.47 36, to zoning boards of appeals, planning boards, conservation commissions, municipal departments of public works, and the boards of selectmen or mayors and city councils, in those communities where such habitats occur, and appropriate regional permit granting commissions.

(b) An owner of land or interest in land adjacent to or potentially within Significant Habitat may request the Director to make a determination whether an activity will occur in a Significant Habitat. The Director may also, on his own initiative, make such a determination.

(5) Preliminary Notice of Activities. Any person filing a petition, request, or application to a board of health, building inspector, zoning board, planning board, or conservation commission for any kind or type of permit, order, variance, ruling or approval regarding a proposed activity within a Significant Habitat shall send notice in writing to the Director within 21 days of such filing; provided that a filing with the NHESP pursuant to rare species provisions of the Wetlands Protection Act regulations (310 CMR 10.37 or 10.59) shall constitute compliance with this provision.

#### ~~10.32~~ **62** Activities Exempt from the Requirement for an Alteration Permit

(1) Agriculture and Aquaculture. The normal maintenance and improvement of land in agricultural or aquacultural use shall be exempt from the requirement to obtain an Alteration Permit. This exemption shall continue only so long as such land remains in agricultural or aquacultural use. Land in agricultural or aquacultural use does not include those portions of a site that are not in such use and are not designated fallow land. The normal maintenance and improvement of land in agricultural or aquacultural use does not include site preparation for purposes of conversion to another, non-agricultural or non-aquacultural use. To qualify for this exemption, land in agricultural use shall have been in such use and not fallow or inactive three out of five years preceding the effective date of designation. To maintain this exemption land in agricultural use must remain in such use but may lie fallow for a period of time if used for agriculture at least three out of every five years. Land lying fallow more than two out of five years shall qualify or continue to qualify for this exemption upon certification by the Commissioner of the Department of Agricultural Resources that the fallow condition of the land is necessary to maintain the land in agricultural use.

(2) Land in forestry use. The normal maintenance and improvement of land in forestry use for which the landowner has engaged in the following consultation and certification process, shall be exempt from the requirement of an Alteration Permit.

(a) Plan submission. A landowner shall submit a forest management plan to the state forester and NHESP for review.

(b) Plan review and consultation. NHESP shall review the forest management plan; shall make recommendations with respect to the avoidance, minimization or mitigation of impacts on Endangered, Threatened, or Special Concern species; and shall submit such recommendations to the landowner and the state forester. Failure of the NHESP to make any such recommendations within 60 days of receipt of such plan shall constitute consultation and approval by NHESP of the plan. The state forester shall review the forest management plan and the NHESP's recommendations. The state forester shall certify the plan if he finds:

1. that the plan constitutes a planned program to improve the quantity and quality of a continuous crop for the purpose of selling such products in the regular course of business; and

2. that the NHESP has determined that the plan will take all practicable means and measures to avoid damage to state listed species or their habitats.

(c) Certification of Plan. If the state forester finds that either requirement has not been met he shall deny certification of the plan and return the plan to the landowner with a statement of the reasons for the denial. If the state forester finds that both requirements have been met he shall prepare a certification document to be signed by both the state forester and the NHESP and affixed to the approved plan and shall send copies of the same to the landowner and NHESP.

(3) Single Family House. A landowner may construct without the requirement of an Alteration Permit a single family house covering no more than 3,000 square feet of ground and install any necessary utilities to service said house and construct in a reasonable fashion a single access driveway to the nearest public or private way on a lot having an area of at least three acres; provided, however, that the lot on which said construction takes place was owned by said landowner and in existence on January 1, 1990; and provided, further, that said lot was not held in common ownership with any adjoining land as of said date. For purposes of 321 CMR 10.32 62(e), the phrase "in existence" shall mean a lot shown on a definitive plan that has received final approval under M.G.L. c. 41 or shown on a plan that has been endorsed under M.G.L. c. 41, § 81(P). Upon submission of a Notice of Intent under the Wetlands Protection Act M.G.L. c. 131, § 40 or application for a building permit, whichever is first, landowners intending to construct such a house shall submit by certified mail or hand delivery to the Director a completed form, available upon request from the Division of Fisheries and Wildlife, and supporting documentation demonstrating that the conditions for the exemption have been met. The form shall request the following information:

- (a) property owner's name and mailing address;
- (b) address of new house;
- (c) occupancy of the proposed house (number of families)
- (d) square feet of ground covered by the house;
- (e) the size of the lot in acres;
- (f) owner of the lot on January 1, 1990;
- (g) ownership of any adjoining land by property owner specified in 321 CMR 10.32 62(3)(f) on January 1, 1990;
- (h) date of approval of the definitive subdivision plan, prepared pursuant to M.G.L. c. 41, or date of endorsement of a plan pursuant to M.G.L. c. 41, § 81(P), showing the house lot, if any;

(i) a plan showing the boundaries of the lot, the location and footprint of the house, the location of any proposed driveways, the location of the nearest public way, and the location of any other existing or proposed structures.

(j) an 8½" x 11" section of a USGS 7½ minute topographic map (original or photocopy) showing the location of the proposed house clearly; and

(k) signature of property owner and date.

(4) Projects in Receipt of a Building Permit or which are in Compliance with MEPA.

Activities within a Significant Habitat shall be exempt from the requirement of an Alteration Permit if either of the following have occurred prior to the issuance of notice of public hearing of proposed Significant Habitat designation pursuant to 321 CMR 10.43 32(1)(a):

(a) a building permit for such activities has been issued; or

(b) the Secretary of EOEa has certified no more than three years prior to designation that a Final EIR for such activities fully and adequately complies with MEPA; provided, however, that such EIR evaluated the potential impacts of the project on the state listed species occurring in the Significant Habitat at the time of designation.

10.33 63 Categorical Alterations and Non-alterations

(1) Alterations of Significant Habitat. The following categories of activities shall always be considered alterations:

(a) construction, reconstruction, or expansion of buildings, structures, roads, driveways, parking areas, towers, sub-surface sewage disposal systems, stormwater management systems, golf courses, reservoirs and dams, ponds however created, utility transmission lines, pipelines, lawns, irrigation systems, or landscaped areas;

(b) clearing, paving, grading, or excavation of land;

(c) mining, including the excavation of sand and gravel;

(d) any activity subject to the jurisdiction of the Wetlands Protection Act (M.G.L. c. 131, § 40) and the regulations promulgated thereunder;

(e) discharge, storage, or disposal of solid waste, rubbish, stormwater, waste water, toxic or hazardous substances, petroleum-based products, dredged materials, or fill;

(f) the pumping or diversion of surface or ground water for any purpose other than for an individual household;

(g) application of pesticides, herbicides, or other biocides; and

(h) forestry activities that are not exempt under 321 CMR 10.32 ~~62~~(2).

(2) Non-alterations of Significant Habitat. Unless a Significant Habitat designation regulation indicates to the contrary, the following categories of activities shall not constitute alterations of Significant Habitat:

(a) maintenance, use, or vertical expansion of existing buildings and structures;

(b) maintenance and use of existing improved roads, driveways, and parking areas, but not including changes in storm water drainage;

(c) maintenance and use of existing lawns and landscaped areas, but not including the application of pesticides, herbicides or other biocides or the installation of underground irrigation systems, and

(d) performance of land surveying activities by a registered land surveyor.

For the purposes of 321 CMR 10.33 ~~63~~(2), "existing" shall mean in existence prior to the issuance of notice of public hearing of proposed Significant Habitat designation pursuant to 321 CMR 10.43 ~~32~~(1)(a).

#### 10.34 ~~64~~ Director's Determination Whether an Activity Will Alter Significant Habitat

(1) Any activity proposed in a Significant Habitat that is not exempted by 321 CMR 10.32 ~~62~~, is neither a categorical alteration under 321 CMR 10.33 ~~63~~(1) nor a categorical non-alteration under 321 CMR 10.33 ~~63~~(2) and is not specified as an alteration in the regulation designating the Significant Habitat, must be reviewed by the Director prior to commencing in order to determine whether the activity is an alteration of Significant Habitat requiring an Alteration Permit.

(2) Requests for such a determination shall be submitted to the Director on an Activity Description Form. Activity Description Forms are available from the Division and shall request the following information:

(a) project/activity name and address;

(b) proponent's name and address;

(c) landowner's name and address;

(d) exact location(-s) of each activity within the Significant Habitat;

(e) description of each activity;

(f) type of each activity;

(g) commencement and completion dates;

(h) signature of proponent and date; and

(i) signature of landowner and date.

(3) The Director shall respond in writing to such requests within 30 days of receipt of all information required on the form. Failure of the Director to respond within 30 days shall be equivalent to a determination that the proposed activity is not an alteration requiring a permit.

(4) The Director shall determine that an activity is an alteration requiring an Alteration Permit if the activity will detrimentally affect the capacity of the habitat to support a population of Endangered or Threatened species.

#### ~~10.35~~ **65** Review Procedures

Activities requiring an Alteration Permit shall be reviewed pursuant to the Standard Permit Review procedures at 321 CMR ~~10.36~~ **66** unless the alteration is subject to Coordinated Permit Review. The following alterations shall be subject to Coordinated Permit Review procedures:

(1) MEPA. Alterations which are part of a project subject to environmental review under MEPA shall be reviewed according to the Coordinated Permit Review procedures at 321 CMR ~~10.37~~ **67**.

(2) Utility Rights-of-way. Vegetation management activities conducted by gas or electric utility companies on existing rights-of-way shall be reviewed according to the Coordinated Permit Review procedures at 321 CMR ~~10.38~~ **68**.

#### ~~10.36~~ **66** Standard Permit Review

(1) Submission of Request to Alter Significant Habitat. A person wishing to alter Significant Habitat shall submit to the Director a completed Request to Alter Significant Habitat (RTA) form. RTA forms are available from the Division and shall request the following information:

(a) project/activity name and address;

(b) proponent's name and address;

(c) landowner's name and address;

(d) a complete description of the project and the anticipated uses, including project locus, site plans, grading plans, and Notice of Intent and response of NHESP to any filing pursuant to the rare species provisions of the Wetlands Protection Act regulations (310

CMR 10.37 or 10.59), if any;

(e) the possible alternatives to the proposed project and anticipated use(s);

(f) the anticipated impacts of the proposed project on any Endangered or Threatened species;

(g) full plans for the protection of any Endangered or Threatened species present and the short term and long term avoidance, minimization or mitigation measures to be taken to provide amelioration of the impact;

(h) the potential economic effects of the proposed project on the proponent and the local community, if any;

(i) signature of proponent and date; and

(j) signature of landowner and date.

(2) Segmentation. Several alterations of Significant Habitat which are part of a single project shall be described on a single RTA. In conducting permit review, the entirety of a proposed project, including likely future expansions, shall be considered, and not separate phases or segments thereof. In determining whether two or more alterations are in fact parts of one project, all circumstances are to be considered, including but not limited to time interval between phases; whether the alterations, taken together, constitute a part of a common plan or scheme; and whether environmental impacts are separable. Ownership by different entities does not necessarily indicate that two alterations are separate. It is the intent of this rule that projects not be segmented or phased to evade or defer review.

(3) Initial Review of RTA for Completeness. The Director shall review the RTA and determine if it contains all necessary information. The Director shall notify the proponent of any additional information necessary to review the alteration no more than 21 days after receiving the RTA. If the Director does not notify the proponent of any additional information requirements within the 21 day period the RTA shall be considered complete.

(4) Director's Review. Within 45 days of receiving all required information, the Director shall determine whether the alteration will reduce the Viability of the Significant Habitat to support the population of Endangered or Threatened species involved; provided, however, that the Director may enter into a written agreement with the proponent to extend the period for such determination.

(5) Consultation. Prior to acting on a RTA, the Director will schedule with the proponent a public consultation session to review the proposed alteration and discuss potential impacts. The Director shall publish a notice of the consultation session in a newspaper of general circulation in the area of the Significant Habitat involved at least seven days before the consultation session.

(6) Criteria for Issuing Permits. The Director shall apply the following criteria when determining whether the proposed alteration will reduce the Viability of the Significant Habitat. The Director shall determine that the alteration will reduce the Viability of the Significant Habitat if an alteration may directly or indirectly:

- (a) change the environment in any way which likely will result in stress, lowered reproduction or growth, or decline of the local population of the Endangered or Threatened species involved;
- (b) prevent, hinder, or stop ecological processes which are important for the survival or recovery of the Endangered or Threatened species involved;
- (c) isolate portions of the Endangered or Threatened species populations from each other;
- (d) disrupt seasonal or daily movements or migrations of Endangered or Threatened animals or dispersal of Endangered or Threatened plants; or
- (e) decrease the probability of long term survival or recovery of the affected local population(s) of Endangered or Threatened species.

(7) Issuance of Permit. The Director shall issue an Alteration Permit only upon determining that the alteration will not reduce the Viability of the Significant Habitat. The Alteration Permit shall contain such conditions as are necessary to ensure that the alteration will not reduce the Viability of the Significant Habitat. The Director may include requirements for biological monitoring as a means for assessing compliance with the terms of the Alteration Permit and the success or failure of avoidance, minimization, or mitigation measures. Unless the terms of the Alteration Permit indicate otherwise, the proponent shall complete the permitted activities within three years of the issuance of the Alteration Permit.

(8) Denial of Permit. The Director shall issue a permit denial upon determining that the alteration will likely reduce the Viability of the Significant Habitat, including a statement of the reasons for such denial.

(9) Revocation. Upon a determination that a proponent is conducting or has conducted activities in violation of an Alteration Permit, the Director may revoke said Alteration Permit. Revocation of a permit shall not limit any other enforcement or penalty for violation of M.G.L. c. 131A or 321 CMR 10.00 30.

#### 10.37 67 MEPA: Coordinated Permit Review

(1) General. Activities which are part of projects reviewed under MEPA are subject to the following coordinated permit review procedures.

(2) Procedures.



- (a) If the secretary of EOEA has certified that a project does not require the preparation of an EIR, the proponent shall submit to the Director a copy of the secretary's ENF certificate.
- (b) If an EIR was prepared for a project and the Final EIR was certified by the secretary, the proponent shall submit to the Director a copy of the secretary's certificate on the Final EIR.
- (c) The Director shall determine whether the NHESP reviewed the project within the time periods prescribed at 321 CMR 10.37 ~~67~~(2)(e) and made recommendations with respect to the avoidance, minimization or mitigation of impacts on Endangered, Threatened, or Special Concern species; and whether the project proponent has incorporated any such avoidance, minimization, or mitigation measures in the project design. If the Director finds that the NHESP made such recommendations and that they were incorporated into the project design by the project proponent, the Director shall issue an Alteration Permit forthwith without further conditions, except that the permit may be conditioned upon implementation of such avoidance, minimization, or mitigation measures, which may include biological monitoring and reporting requirements to enable the Director to determine if the avoidance, minimization, or mitigation measures are fulfilling the conditions of the permit.
- (d) If the Director finds that the project proponent has not incorporated such recommendations, the Director shall deny the permit.
- (e) Failure of the NHESP to make any recommendations within the following time periods shall be equivalent to the issuance of a permit by the Director:
1. if an EIR is not required, or further review is not required after notice of project change, 90 days after the secretary issues a notice of the receipt of the ENF, as described in M.G.L. c. 30, § 62A and the regulations thereunder;
  2. if an EIR is required, or further review is required, prior to certification by the Secretary that the final EIR or project change adequately and properly complies with MEPA; or
  3. if preparation of an EIR has been waived by the Secretary, during the time period prescribed by the MEPA regulations for comments on the tentative grant of waiver.

10.38-68 Vegetation Management on Existing Utility Rights-of-Way: Coordinated Permit Review

(1) General. Activities which consist of vegetation management activities conducted by gas or electric utility companies on existing rights-of-way subject to review under 333 CMR 11.00 are not subject to standard review under 321 CMR 10.36 ~~66~~ by the Director if the following coordinated permit review procedures are followed.

(2) Review of Vegetation Management and Yearly Operating Plans. Vegetation Management Plans (VMPs) and Yearly Operating Plans (YOPs) shall be submitted to NHESP at the same time they are submitted to the Department of Agricultural Resources, pursuant to M.G.L. c. 132B, § 6B and 333 CMR 11.00. For the purposes of 321 CMR 10.38, the VMP or YOP shall mean the document prepared for the Department of Agricultural Resources pursuant to 333 CMR 11.00 and any maps or plans of appropriate scale and detail requested by NHESP for the purpose of determining the precise location of vegetation management activities. If NHESP does not request any such maps or plans during the review period the VMP or YOP shall be considered complete. No more than 90 days following receipt of the VMP or YOP, NHESP shall provide recommendations to the applicant and the Department of Agricultural Resources with respect to the avoidance, minimization or mitigation of impacts on state listed species.

(3) Issuance of a Permit By the Director.

(a) Request for Permit. Prior to commencing vegetation management activities the applicant shall submit to the Director copies of the VMP, YOP, and comments submitted by the NHESP on the VMP and YOP, if any.

(b) Review of Materials. Based on the materials submitted, the Director shall determine whether the NHESP reviewed the VMP and YOP within 90 days of receipt of such plans and made recommendations with respect to the avoidance, minimization or mitigation of impacts on state listed species; and whether the applicant has incorporated any such avoidance, minimization, or mitigation measures in the VMP and YOP. If the Director finds that the NHESP made such recommendations and that they were incorporated into the VMP and YOP by the applicant, the Director shall issue an Alteration Permit forthwith without further conditions, except that the permit may be conditioned upon implementation of such avoidance, minimization, or mitigation measures, which may include biological monitoring and reporting requirements to enable the Director to determine if the avoidance, minimization, or mitigation measures are fulfilling the conditions of the permit. The Director shall send a copy of the Alteration Permit to the Department of Agricultural Resources.

(c) Denial of Permit. If the Director finds that the applicant has not incorporated such recommendations, the Director shall deny the permit. The Director shall send notice of denial of the permit to the applicant and the Department of Agricultural Resources.

(4) Failure of NHESP to Comment. Failure of the NHESP to make any recommendations within 90 days of receipt of the VMP or YOP shall be equivalent to the issuance of a permit by the Director. This rule applies only to VMPs or YOPs submitted to NHESP after the issuance of notice of public hearing of proposed Significant Habitat designation pursuant to 321 CMR 10.43 ~~32~~(1)(a). Upon request of the landowner or applicant, the Director shall determine whether NHESP failed to comment within 90 days of receipt of the VMP or YOP and certify in writing NHESP's failure to comment if such failure occurred.

#### ~~10.39~~ **69** Recording of Alteration Permits

Prior to commencement of any alteration permitted by an Alteration Permit, the Alteration Permit shall be recorded by the record owner in the Registry of Deeds, or filed with the Land Court for the district in which the land is located, within the chain of title of the affected property and shall also be noted in the Registry's Grantor Index under the name of the owner of the land upon which the proposed alteration will take place. If the record owner fails to record the Alteration Permit, the Director may do so. In the case of registered land, the Alteration Permit shall also be noted on the Land Court Certificate of Title of the owner of the land upon which the proposed alteration will take place.

#### ~~10.40~~ **70** Variance

(1) The Director may issue a variance from the requirement of 321 CMR ~~10.36~~ **66** that an alteration not reduce the Viability of the Significant Habitat if he finds that:

(a) there are no reasonable conditions or alternatives that would allow the project to proceed in compliance with the regulation;

(b) that avoidance, minimization, or mitigating measures are proposed that will allow the project to be conditioned so as to contribute to the protection of the Viability of the Significant Habitat to support the local population of Endangered or Threatened species involved; and

(c) that the variance is necessary to avoid permit conditions or the denial of a permit that so restricts the use of property as to constitute an unconstitutional taking without compensation.

(2) A request for a variance shall be made in writing and shall include, at a minimum, the following information:

(a) a description of alternatives explored that would allow the project to proceed in compliance with the regulation and an explanation of why each is unreasonable;

(b) a description of the avoidance, minimization, or mitigating measures to be used to contribute to the protection of the Viability of the Significant Habitat to support the population of Endangered or Threatened species involved; and

(c) evidence that the permit conditions or denial of a permit so restricts the use of the land that it constitutes an unconstitutional taking without compensation.

(3) The request for a variance shall be sent to the Director by certified mail or hand delivered and shall not be filed until the applicant first completes the review procedures described at 321 CMR ~~10.36~~ **66**. The Director shall arrange forthwith for publication of notice of receipt of the request in the Environmental Monitor. After reviewing the information submitted with the request for a variance and any other information

submitted by any party within 21 days of the publication of the notice in the Environmental Monitor, the Director shall issue a written decision whether to grant the request.

#### 10.41 71 Appeals of Alteration Permit Decisions

(1) Process. Within 21 days of the Director's decision under 321 CMR 10.36 66, 10.37 67, or 10.38 68, or failure to act under 321 CMR 10.36 66, record owners of lands or interests in lands aggrieved thereby may appeal by sending a notice of appeal to the Secretary of EOEa by certified mail. The Secretary shall hold a hearing on such appeal within a reasonable time, and in no case later than 120 days after such decision. The Secretary shall make a determination thereon within 60 days of the hearing.

(2) Standard of Review. The Secretary of EOEa shall overturn a decision of the Director only upon a finding that it was without substantial basis in fact, but shall fully examine on the merits any appeal involving the Director's failure to act under 321 CMR 10.36-66. For the purposes of 321 CMR 10.41 71, "without substantial basis in fact" shall mean:

(a) with respect to a permit denial, that there is no credible scientific information in the record to support the finding that the proposed alteration will reduce the Viability of the Significant Habitat; or

(b) with respect to the Director's conditioning of a permit, that there is no credible scientific information in the record that said conditions do not reasonably limit the proposed alteration's potential adverse effect on the Viability of the Significant Habitat.

#### 10.42 72 Court Action

In addition to the procedures specified in 321 CMR 10.41 71, a landowner aggrieved by a decision of the Director may file an action in superior court department of the trial court to determine whether such decision constitutes an unconstitutional taking without compensation.

### **PART IV V: LISTS, DESIGNATED SIGNIFICANT HABITATS**

#### 10.60 90 List of Endangered, Threatened, and Special Concern Species

(1) Introduction. The list in 321 CMR 10.60 90 contains the names of all species of plants and animals which have been determined to be Endangered, Threatened, or of Special Concern pursuant to M.G.L. c. 131A and 321 CMR 10.03.

(2) List Format. The columns entitled "Common Name" and "Scientific Name" define the species listed. In the "Status" columns the following symbols are used: "E" for Endangered, "T" for Threatened, and "SC" for Special Concern. The status defined under the "MA" column denotes the official status of the species in Massachusetts pursuant to M.G.L. c. 131A and 321 CMR 10.00. The status under the "US" column is the status of

the species under the federal Endangered Species Act at the time of the latest revision of 321 CMR 10.00 and is given for informational purposes only. Recent changes in the federal list might not be reflected on this list. The U.S. Fish and Wildlife Service should be consulted for official and up to date information on the federal status of any species. Inquiries may be made by writing to U.S. Fish and Wildlife Service, 400 Ralph Pill Marketplace, 22 Bridge Street, Concord, NH 03301-4901. The "Taxonomic Family/Taxonomic Group" column of the list is included for the purpose of organization. The "Notes" column directs the reader to footnotes which further define or clarify the status of a species or alternative names of species.

(3) Organization of the List. The list is generally organized according to the relationship of the listed species as determined by the science of taxonomy, which groups and categorizes species that are similar on the basis of shared evolutionary descent. The most basic division in the list is between animals and plants. Within animals the list is divided between vertebrates (animals with backbones) and invertebrates (animals without backbones). Within vertebrates, invertebrates, and plants the list is further divided into categories which are generally recognized, such as fish, mammals, dragonflies, and violets. All such information has no regulatory effect and is provided only for the purpose of organizing the list. The following outline shows the taxonomic categories used and their order. A species name index is provided after the list at 321 CMR 10.64 ~~91~~ to assist the reader in finding species on the list.

## ANIMALS

### Vertebrates

Fish

Amphibians

Reptiles

Birds

Mammals

### Invertebrates

Sponges

Flatworms

Moss Animals

Segmented Worms

Snails

Mussels

Crustaceans

Dragonflies

Damselflies

Beetles

Butterflies and Moths

## PLANTS

Aceraceae (Maples)

Adiantaceae (Cliff Ferns)...

through...(alphabetically by scientific family name)  
Verbenaceae (Vervains)  
Violaceae (Violets)

(4) The Massachusetts List of Endangered, Threatened, and Special Concern species

NOTE TO REVIEWERS: FOR PURPOSES OF THIS REVIEW, THE LIST OF ENDANGERED, THREATENED, AND SPECIAL CONCERN SPECIES IS OMITTED. IT WILL NOT CHANGE AT THIS TIME AND DOES COMPRISE PART OF 321 CMR 10.00.

~~10.6+~~ **91** Index to State Listed Species

The following index is intended to help users of the state list of Endangered, Threatened, and Special Concern species determine the official status of any species listed under MESA. This is particularly important for users of the list who are not familiar with the scientific names of species. Starting with only a common or scientific name, the index tells the user where to find the species on the list. The index accomplishes this by specifying the name of the animal group or plant family under which the species will be found.

For example, to find the status of *Acipenser brevirostrum*, one would look up "*Acipenser*" in the index and find that it is a fish. Where fish occur in the list is specified by the outline appearing just before the list at 321 CMR 10.60 **90**(3). The outline shows that fish is the first category of vertebrate animals. By looking for "*Acipenser brevirostrum*" in that section of the list one would determine that it is the "Shortnose Sturgeon" and is listed as an Endangered species on both the state and federal lists.

Note that all plants are found under plant families which end with "-aceae" and that animals are listed under commonly known categories, such as birds, mammals, or butterflies.

NOTE TO REVIEWERS: FOR PURPOSES OF THIS REVIEW, THE INDEX TO ENDANGERED, THREATENED, AND SPECIAL CONCERN SPECIES DOES NOT APPEAR HERE. THE INDEX IS NOT CHANGED AND DOES COMPRISE A PART OF 321 CMR 10.00.



10.70 ~~99~~ Designated Significant Habitats (reserved)

Regulatory Authority: M.G.L. c. 131A, § 4.